IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

v.

TRANS WORLD AIRLINES, INC.

(ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT)

MOTION OF UNITED AIR LINES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE OF UNITED AIRLINES, INC.

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THE NATURE OF UNITED AIR LINES, INC'S.[1] INTEREST

United Air Lines Inc. ("United") operates the largest airline in the United States and has a direct interest in the

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[1] United Air Lines, Inc. is a corporation, and its parent corporation is UAL Inc. with offices at 1200 Algonquin Road, Elk Grove, Illinois 60666.

holding this Court will make, relevant to the first question to be disposed of under the petition for certiorari of Trans World Airlines, Inc. ("TWA"), as to what constitutes a "willful" violation of the Age Discrimination in Employment Act ("ADEA"). (29 U.S.C. § 621-634.) This interest arises because of the following facts.

United and the Air Line Pilots Association, International ("ALPA"), were sued by 112 plaintiffs in the United States District Court for the Northern District of Illinois for violating the ADEA because of United's policy which has required "Second Officers" (flight engineers who are required by United to be pilot trained) to retire at age 60. There were two classes of plaintiffs. The *Monroe* plaintiffs were Second Officers who wished to continue employment after age 60. The *Higman* plaintiffs were Captains or First Officers (pilots charged with flying the aircraft) who wished to "downbid" to Second Officers, using their seniority to "bump" active flight engineers,[2] because they could no longer serve as pilots or co-pilots after age 60 under an industry-wide FAA safety rule. (14 C.F.R. § 121.383(c).)

Among the defenses asserted by United was that being under age 60 was a bona fide occupational qualification ("BFOQ") for all members of the cockpit crew, pilots and flight engineers alike, under 20 U.S.C. § 623(f)(1). United's evidence showed that in 1960 it had established the policy that all crew members must retire at age 60 for safety reasons. This was seventeen years before the ADEA was enacted, and nine years before the FAA adopted the rule prohibiting Captains and First Officers from serving after age 60 for safety reasons. Prior to an April 6, 1978 amendment, United was permitted to retire crew members at age 60 under its pension plan. *United Air Lines* v. *McMann*, 434 U.S. 192 (1977). After the pension

[2] Under United's agreement with ALPA, Captains and First Officers could not downbid to Second Officers before or upon reaching 60, and "career" Second Officers had to retire at age 60 under United's under-60 cockpit rule.

plan exemption was repealed by Congress, United continued its age 60 policy as to Second Officers for what it continued to perceive as reasons of safety.

The case was tried before a jury which returned verdicts in favor of all 112 pl ntiffs. United was also found guilty of a willful violation, and double damage judgments were entered totalling $18,092,637.62. The District Court had instructed the jury that a violation was willful "if the unlawful action taken is knowing and voluntary, and United knew or reasonably should have known that its actions violated the ADEA." This instruction followed a test laid down by the Court of Appeals for the Seventh Circuit in *Syvock* v. *Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149, 155 (C.A. 7, 1981). The jury's finding of willfulness as to both classes of plaintiffs was sustained by the District Court.

The trial judge said that United "would also know" that a prior decision of another judge, denying plaintiffs a preliminary injunction because they had no "reasonable probability of ultimate success on the merits", had been "erroneous" and that United's failure to modify its collective bargaining agreement when it knew or should have known that it was violating the ADEA (as the jury subsequently decided) also showed willfulness. (32 F.E.P. cases 1256, at 1257 and fn. 2).

United and ALPA have appealed the judgments to the United States Court of Appeals for the Seventh Circuit. (Docket Nos. 83-1245, 83-1273, 83-1305, 83-1498). That Court presently has these appeals under advisement.

Consent to the filing of a brief amicus curiae by United Air Lines, Inc., has been refused by a party to this case.

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REASONS FOR BELIEVING THAT THE WILLFULNESS ISSUE WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES.

United has discriminated because of age but has asserted a BFOQ defense as to all plaintiffs.[3] "An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, but to avoid any penalty." *Marshall* v. *Westinghouse Electric Corp.*, 576 F.2d 588 (C.A. 5, 1978). Since United "voluntarily" and "knowingly" adopted its age 60 policy in the 1950s, it is United's position that the issue of willfulness as applied to a BFOQ defense must necessarily involve factors other than "knowing" and "voluntary" action; otherwise, the BFOQ defense automatically results in a willful violation if the BFOQ defense is not accepted.

TWA is not raising a BFOQ defense in this Court[4] and therefore the question of willfulness is posed—and may be considered by this Court—in a context which fails to consider the important situation of the application of the willfulness issue to a BFOQ defense. In short, under the questions presented by the TWA petition (No. 1; pp. 9-12), were willfulness to be established by a simple showing of specific intent, then when any BFOQ defense fails the violation will be perforce equated with a willful violation, although the statute clearly intends to distinguish between the two.

TWA's certiorari petition demonstrates considerable conflict and confusion in the lower courts as to the proper definition of "willful" in an action under the ADEA.[5] However, no

[3] United's trial resulted in an evidence transcript of about 7,000 pages, much of it medical, and hundreds of exhibits, addressed to the question whether age 60 is a justifiable age at which, for reasons of public safety, to exclude flight personnel from operating in the cockpit of a jet airliner.

[4] It was raised by ALPA in the Court of Appeals but that Court held *inter alia* that it lacked jurisdiction to entertain ALPA's claim. 32 EPD ¶ 33,757, pp. 30,634-6.

[5] This confusion and conflict is even greater than TWA's petition indicates. See: 55 ALR Fed. 604: "Award of Liquidated Damages Under § 7 of Age Discrimination In Employment Act of 1967 (29 USC § 626) For 'Willful' Violations Of The Act."

reported case, so far as United is aware, has considered under what circumstances a violation is "willful" when, as in United's case, there is intentional age discrimination that is claimed to be justified under the BFOQ defense; also, whether compliance with a collective bargaining agreement containing an age-neutral bona fide seniority system constitutes a reasonable factor other than age defense to a charge of "willfulness."

Because United apprehends that "intentional" age discrimination may be erroneously equated with "willful" age discrimination under the presentation made by TWA, it wishes an opportunity to state its views to the Court respecting the interpretation that should be given to the word "willful" in ADEA cases, lest the Court formulate a rule which fails to treat the particular situation of an age-based policy with the special consideration it requires.

WHEREFORE, it is requested that this Court grant leave to United Air Lines, Inc. to file the Brief *amicus curiae* which accompanies this motion.

Respectfully submitted,

EDWARD L. FOOTE,

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United Air Lines, Inc.

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THE INTEREST OF UNITED IN THIS CASE.

The interest of United Air Lines, Inc. ("United") in this case is set forth in the motion for leave to file this Brief. In sum, a judgment of over $18,000,000, including $9,000,000 resulting from a determination of "willfulness," has been entered against United in the United States District Court for the Northern District of Illinois. The appeal from this judgment is now under advisement by the United States Court of Appeals for the

Seventh Circuit. One of the issues urged is that United had in no event willfully violated the Age Discrimination in Employment Act ("ADEA"), but had, long before the ADEA and in the interest of public safety, adopted an under-60 rule as a bona fide occupational qualification ("FBOQ") for every person (Captain, Co-Pilot and Flight Engineer) in the cockpit of its jet liners, similar to the industry-wide rule subsequently adopted by the FAA which forbids the Captain and Co-Pilot from being over 60 years of age.

United is, thus, acutely interested in the ruling which this Court may make in respect to the first question presented by the petition for certiorari of Trans World Airlines Inc. ("TWA") relating to the meaning of a "willful" violation of the ADEA.

SUMMARY OF ARGUMENT.

If, on the basis of substantial medical evidence, an employer reasonably believes that unpredictable physically disabling events happen to personnel more frequently with increasing age, and if the duties of the personnel involved relate entirely to the safety of the public, then the adoption of an express age-based retirement rule should not subject the employer to punitive double recovery, even though a trier of fact may ultimately decide in favor of plaintiffs despite the defense that the age specified is a valid occupational qualification.

The general test of "willfulness" under the ADEA, which can henceforth serve all varieties of cases arising under the Act, should require a finding of *deliberate disregard of the law with the purpose to evade its known requirements.*

ARGUMENT.

This Court should not adopt a definition of "willful" under the ADEA that would permit the finder of fact to find that an intentional age-based policy constituted a "willful" violation of the Act even though the employer had a reasonable and good faith belief that the policy was an occupational qualification.

The certiorari petition of TWA shows that the lower courts have adopted various standards to determine "willfulness" under the ADEA. *Inter alia* it urges a test found in the opinion of the Seventh Circuit Court of Appeals. It quotes at page 10 that "a finding of willfulness should lie *only* if there is some showing as to the defendant's *knowledge of the illegality* of his actions." *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (C.A. 7, 1981). But the sentence which the petition quotes is followed by the sentence:

> "We hold that, in order to prove willfulness under (29 U.S.C. § 626(b) (1976)), a plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA."

This latter is the instruction which was given the jury in the case against United and on the basis of which a finding of "willful" violation was made.

Such a test, or a comparable one, is easily subject to misinterpretation by a jury or the lower courts. The "reasonably should have known" alternative cancels out the test of knowing and deliberate violation, stated in the preceding sentence, and, in effect, permits a negligence test. (*E.g., Orzell* v. *City of Wauwatosa Fire Department*, 697 F.2d 743, 759 (C.A. 7, 1983), *cert. den.* 11/28/83, Docket No. 83-205—"reasonably should have known.") " 'Should know' indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence

thereof in the proper performance of that duty." "*Restatement of the Law of Torts (2d)*, § 12.

Many of the tests formulated by some of the lower courts are implicitly, and sometimes explicitly, based on the following reasoning: Everyone is charged with knowing the law; what the defendant did, it did intentionally; therefore, if it violated the Act, it "willfully" violated the Act. The practical *result* of many decisions in the lower courts is to make a doubling of recovery almost automatic, once a violation has been shown.

Although any test that this Court may lay down is capable of being misinterpreted or wrongfully applied by a court or jury, the *Syvock* test led to a finding of willfulness by a jury in *United*'s case that was sustained by the District Court notwithstanding: (a) that United's age 60 policy preceded the ADEA by seventeen years and the FAA's own age 60 rule for Pilots and Co-Pilots by nine years; (b) that a district judge had denied a preliminary injunction on the grounds that plaintiffs probably would not prevail at a trial in showing a violation of the Act; and (c) that United was barred from transferring the pilot plaintiffs down to Second Officers (Flight Engineers) by its age-neutral collective bargaining agreement with Air Line Pilots Association, International ("ALPA"). Because United's policy was expressly based on age, it was undeniably intentional, and this sufficed to make it "willful" for purposes of punitive double recovery.

This Court has stated that "willful" "is a word of many meanings, its construction often being influenced by its context" (*Spies* v. *United States*, 317 U.S. 492, 497 (1943)) and has discussed the meaning of the word "willful" several times in criminal cases.

In *Fountain* v. *United States*, 96 U.S. 699, 702 (1877) and *Spurr* v. *United States*, 174 U.S. 728, 734 (1899), this Court quoted from authorities which stated that the word "willful" "in the ordinary sense in which it is used in statutes means not

merely 'voluntarily but with a bad purpose' " and that the word is frequently understood "as signifying an evil intent without justifiable excuse." See also, *Potter* v. *United States*, 155 U.S. 438, 446 (1984) (willful " 'implies knowledge and a purpose to do wrong' "); *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) ("willfully" filing a false income tax return means "an intentional violation of a known legal duty"); *Hertzel* v. *United States*, 322 U.S. 680, 686 (1944); *Crews* v. *United States*, 325 U.S. 91, 101 (1945); *Morissette* v. *United States*, 342 U.S. 246, 264 (1952); *Heikkinen* v. *United States*, 355 U.S. 273, 279 (1958).

Only once, so far as we can ascertain, has this Court considered the meaning of "willful" in a civil action. In *United States* v. *Illinois Central Ry. Co.*, 303 U.S. 239, 243 (1958), it was said that the word "means purposely or obstinately and it is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."*

The word "willful" is not defined in the ADEA. Moreover, "A review of the legislative history of the ADEA and its assimilated acts uncovers nothing helpful on [the question of willfulness.]" *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 282 (C.A. 3, 1980).**

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* At least one Court of Appeals has applied a "deliberate flaunting of the Act" test for a "willful" violation of the Occupational Safety and Health Act (OSHA). (29 U.S.C. § 666; 29 U.S.C. § 651 et seq.) *Frank Irey, Jr., Inc.* v. *OSHA*, 519 F.2d 1200, 1207 (C.A. 3, 1974) *aff'd en banc* 519 F.2d 1215 (C.A. 3, 1975) *aff'd on other grounds*, 430 U.S. 442 (1977).

** The House Report merely repeats the words of the statute. H.R. No. 805 to accompany H.R. 13054, U.S. Code Congressional and Administrative News, 90th Cong. 1st Sess. (1967) Vol. 2, pp. 2218, 2222.

Similarly, Congress, in passing the 1978 amendments, threw no light on the meaning of "willful." It stated, "[ADEA] includes

(Footnote continued on following page)

The word "willful", however it may be defined by this Court, should be given a definition that will accommodate the defenses permitted under the ADEA and utilized in good faith by the employer and which will not automatically permit a finding of "willful" violation if the trier of fact* fails to regard the defenses as having been proven.

United's BFOQ defense based on the policy that no one over 60 years of age should be an active member of the cockpit crew of a jet liner is just such a defense. (29 U.S.C. § 623(f)(1).)

Also, United asserted a reasonable factor other than age ("RFOA") defense under 29 U.S.C. § 623(f)(2), that the bona fide seniority system established by its collective bargaining contract with ALPA barred all "downbidding" (with only a few, non-age related exceptions), including to Second Officer status by Captains and Co-Pilots who seek, after their age 60, to use their seniority to "bump" active Second Officers. Any such practice would be a breach of a labor contract which was age-neutral in all its provisions. Yet the trial judge in *United's* case upheld the jury finding of willfulness because he considered it "willful" for United not to have modified its collective bargaining contract.

Obviously, Congress, in providing for double damages for "willful" violation, intended to create two classes of violators, one "willful" and the other "non-willful." An age policy is necessarily adopted with specific intent to discriminate on the basis of age, but the act permits such a policy if it can be justified as of a bona fide occupational qualification. If the trier of fact finds that the policy meets this requirement, there is, of

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(Footnote continued from preceding page)

liquidated damages" (calculated as an amount equal to the pecuniary loss) "which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA." H. Cong. Report No 95-950, 95th Cong. 2d, Sess. 13 (1978). Reprinted in Volume 3 U.S. Code Congressional and Administrative News, p. 528 at 535.

* There is a right to jury trial in ADEA cases. 29 U.S.C. § 626(c)(2).

course, no liability. But the trier of fact may also find that such a policy, even though adopted and continued in good faith, and without a bad purpose or a plain indifference to the law, is not an occupational qualification sufficiently proven to deny all recovery to plaintiffs. This should not automatically subject the employer to double damages.

CONCLUSION

The word "willful" in the ADEA should be defined by this Court in such a way as to preclude a trier of fact from finding a "willful" violation merely because an age policy was intentionally adopted, if the trier further finds that the age policy was adopted by the employer in the good faith belief that being under a certain age is a reasonable occupational qualification for the job involved or that age-neutral contract provisions preventing job-change down-bumping by anyone (including persons legally disqualified for one job after a certain age) must be adhered to.

The definition already laid down by this Court in *United States* v. *Illinois Central R.R. Co.*, 303 U.S. 239, 243 (1958) would have this effect and would not only encompass the 'knowledge of illegality' test urged by TWA but also constitute an unambiguous general rule for application in all ADEA cases.

Respectfully submitted,

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